A

ZAHEED AHMAD & ORS

v.

THAM POH THENG & ORS

B

COURT OF APPEAL, PUTRAJAYA
ZULKEFLI MAKINUDIN JCA
RAUS SHARIF JCA
HELILIAH MOHD YUSOF JCA
[CIVIL APPEAL NO: A-02-716-2004]

C

25 MAY 2007

CONTRACT: *Sale and purchase of property - Enforceability - Offer and acceptance - Third party claims - Equitable remedies*

D

LAND LAW: *Sale of land - Contract for sale of property - Enforceability - Offer and acceptance - Third party claims - Equitable remedies*

This was an appeal by the 3rd, 4th and 5th defendants against the decision of the High Court holding that there was an enforceable contract entered into between the 1st defendant and
E the plaintiff for the sale and purchase of a shop house in Mukim Sitiawan, Perak ('shop house'). The 3rd, 4th and 5th defendants claimed that they had an enforceable contract with the 1st defendant over the same shop house. The 1st defendant was the beneficial owner of the shop house while the 2nd defendant was
F the registered owner. The plaintiff paid the firm of solicitors representing the 1st defendant ('AB solicitors') RM13,000, representing 10% of the purchase price, as deposit for the purchase of the shop house. The 1st defendant contended, and this was the crux upon which the case revolved, that the offer to
G purchase was withdrawn on 20 October 1999 as the plaintiff had failed to pay RM18,000, which was the deposit for the revised purchase price of RM180,000 for the shop house. As a result, the 1st defendant entered into another agreement with the 3rd, 4th and 5th defendants for the sale and purchase of the shop house.
H This agreement was purportedly signed on 25 October 1999 and the 10% deposit was paid on 22 October 1999. The plaintiff, unhappy with the actions of the 1st defendant, lodged a caveat on the title of the shop house and sought certain reliefs from the court. The learned trial judge found in favour of the plaintiff;
I hence, the present appeal.

Held (dismissing the appeal)
Per Raus Sharif JCA delivering the judgment of the court:

(1) The learned judge held that the second offer to purchase the shop house commenced when AB solicitors, on 23 September 1999, wrote to the plaintiff's solicitors declaring the purchase price had been varied to RM180,000. The offer was accepted by the plaintiff when the plaintiff's solicitors, by letter dated 21 October 1999, tendered two cheques amounting to RM18,000 (as deposit) and RM500 (as service fees for transfer of the shop house from the 2nd defendant to the 1st defendant) respectively to AB solicitors. The conclusion reached by the learned judge was based on the credibility of the witnesses and the impression that he formed from the facts. He found, as a fact, that the plaintiff's acceptance of the offer was received by AB solicitors on 22 October 1999 and not 23 October 1999 as claimed by the 1st defendant. The learned judge disbelieved the 1st defendant's story as he found the evidence of the 1st defendant to be lacking in credibility. He gave his reasons for holding as such and they were not in any way tainted with a lack of judicial appreciation of the evidence placed before him. He neither committed any fundamental misdirection nor was he plainly wrong in his conclusion or inference to justify this court's intervention. Thus, there was no reason to reverse the findings of the learned judge. There was an enforceable contract between the plaintiff and the 1st defendant over the shop house. (paras 13 & 17)

(2) The learned judge further found that since the plaintiff had a prior right to the shop house, the 3rd, 4th and 5th defendants' claim that they had an enforceable contract with the 1st defendant could not succeed. He also made a finding that the equitable principle of a *bona fide* purchaser for value, as claimed by the 3rd, 4th and 5th defendants, had no application in this case as, firstly, it was not pleaded and, secondly, the facts did not support such a claim. There was no reason to differ from the learned judge. The 3rd, 4th and 5th defendants were not innocent *bona fide* purchasers as they claimed. The facts as found by the learned judge clearly demonstrated that they knew about the transaction between the plaintiff and the 1st defendant. Even in law, the 3rd, 4th

and 5th defendants could not claim that they had no knowledge of the said transaction since their solicitors were AB solicitors. Their solicitors knew of the existence of the transaction between the plaintiff and the 1st defendant. It is an established principle that the knowledge of a solicitor is the knowledge of the client. Hence, the 3rd, 4th and 5th defendants, being aware of the existence of an existing transaction between the plaintiff and the 1st defendant, could not, as they did, claim that they were innocent *bona fide* purchasers of the shop house. (paras 18 & 19)

Bahasa Malaysia *translation of headnotes*

Ini adalah rayuan oleh defendan-defendan ketiga, keempat dan kelima terhadap keputusan Mahkamah Tinggi yang memutuskan bahawa terdapat suatu kontrak yang boleh dikuatkuasa yang dimasuki di antara defendan pertama dan plaintif bagi penjualan sebuah rumah kedai di Mukim Sitiawan, Perak ('rumah kedai'). Defendan-defendan ketiga, keempat dan kelima menuntut bahawa mereka mempunyai suatu kontrak yang boleh dikuatkuasakan dengan defendan pertama berkaitan dengan rumah kedai yang sama. Defendan pertama dalah pemilik benefisial rumah kedai tersebut sementara defendan kedua adalah pemilik berdaftarnya. Plaintif telah membayar kepada firma guaman yang mewakili defendan pertama ('peguamcara AB') sebanyak RM13,000, iaitu 10% dari harga belian, sebagai deposit bagi pembelian rumah kedai. Defendan pertama menyatakan, dan ini merupakan asas di mana kes berkisar, bahawa tawaran untuk membeli telah ditarik balik pada 20 Oktober 1999 disebabkan plaintif gagal membayar RM18,000, iaitu deposit bagi harga baru rumah kedai yang disemak semula sebanyak RM180,000. Disebabkan itu, maka defendan pertama telah memeterai perjanjian baru dengan defendan-defendan ketiga, keempat dan kelima bagi jual beli rumah kedai. Perjanjian ini nampaknya ditandatangani pada 25 Oktober 1999 dan deposit 10% telah dibayar pada 22 Oktober 1999. Tidak berpuas hati dengan tindakan defendan pertama, plaintif memasukkan caveat ke atas hakmilik rumah kedai dan memohon beberapa relif dari mahkamah. Yang arif hakim bicara memutuskan dengan berpihak kepada plaintif sekaligus membangkitkan rayuan di sini.

Diputuskan (menolak rayuan)
Oleh Raus Sharif HMR menyampaikan penghakiman mahkamah:

(1) Yang arif hakim memutuskan bahawa tawaran kedua untuk membeli rumah kedai bermula apabila peguamcara AB menulis kepada peguamcara plaintif pada 23 September 1999 mengisytiharkan bahawa harga belian telah diubah kepada RM180,000. Tawaran telah diterima oleh plaintif bilamana peguamcara plaintif, melalui surat bertarikh 21 Oktober 1999, mengemukakan dua cek berjumlah RM18,000 (sebagai deposit) dan RM500 (sebagai yuran perkhidmatan bagi pindahmilik rumah kedai dari defendan kedua kepada defendan pertama) kepada peguamcara AB. Konklusi yang dicapai oleh yang arif hakim adalah berdasarkan kepada keboleh-percayaan saksi-saksi dan atas gambaran yang dibuat oleh beliau daripada fakta-fakta. Beliau mendapati, sebagi satu fakta, bahawa penerimaan tawaran oleh plaintif telah disampaikan kepada peguamcara AB pada 22 Oktober 1999 dan bukannya pada 23 Oktober 1999 seperti yang didakwa oleh defendan pertama. Yang arif hakim tidak mempercayai cerita defendan pertama disebabkan beliau mendapati tidak ada kredibiliti pada keterangan defendan pertama. Beliau memberikan sebab-sebab kenapa beliau beranggapan demikian, dan dapatan-dapatan beliau tersebut tidak menunjukkan bahawa beliau telah gagal membuat penilaian kehakiman seperti yang dikehedaki dari beliau. Beliau tidak melakukan sebarang salah-arahan fundamental ataupun kesalahan di dalam keputusannya bagi membolehkan campurtangan mahkamah ini. Oleh itu, tiada alasan untuk mengakas dapatan-dapatan yang dibuat oleh yang arif hakim. Tidak wujud apa-apa kontrak yang boleh dikuatkuasa di antara plaintif dan defendan pertama berkaitan rumah kedai.

(2) Yang arif hakim juga mendapati bahawa oleh kerana plaintif mempunyai hak terdahulu ke atas rumah kedai, maka dakwaan defendan-defendan ketiga, keempat dan kelima bahawa mereka mempunyai kontrak yang boleh dikuatkuasa dengan defendan pertama tidak akan berjaya. Beliau juga membuiat dapatan bahawa prinsip ekuiti pembeli *bona fide* dengan nilai, seperti yang didakwakan defendan-defendan ketiga, keempat dan kelima, adalah tidak terpakai kepada kes di sini oleh kerana,

pertama, ia tidak diplidkan dan, kedua, fakta-fakta tidak menyokong pengataan sedemikian. Tidak ada alasan untuk berbeza pendapat dengan yang arif hakim. Defendan-defendan ketiga, keempat dan kelima bukan pembeli *bona fide* yang tidak berdoasa seperti yang mereka dakwa. Fakta-fakta seperti yang didapati oleh yang arif hakim menunjukkan dengan jelas bahawa mereka mengetahui tentang transaksi di antara plaintif dan defendan pertama. Di sisi undang-undang pun defendan-defendan ketiga, keempat dan kelima tidak boleh berkata bahawa mereka tidak tahu menahu tentang transaksi disebabkan peguamcara mereka adalah peguamcara AB. Peguamcara mereka mengetahui tentang kewujudan transaksi di antara plaintif dan defendan pertama. Sudah menjadi prinsip mantap bahawa pengetahuan peguamcara adalah juga pengetahuan anakguam. Oleh itu, defendan-defendan ketiga, keempat dan kelima, dengan mengetahui mengenai kewujudan transaksi di antara plaintif dan defendan pertama, tidak boleh, sepertimana halnya, mendakwa bahawa mereka adalah pembeli *bona fide* rumah kedai yang tidak berdosa.

Case(s) referred to:

China Airlines Ltd v. Maltran Air Corporation Sdn Bhd & Another Appeal [1996] 3 CLJ 163 FC ***(refd)***

Doshi v. Yeoh Tiong Lay [1975] 1 MLJ 85 ***(refd)***

For the appellants - Ngeh Koo Ham; M/s Ngeh & Co

For the 1st respondent - Ng Poh Tat; M/s Ng Poh Tat & Co

For the 1st & 2nd defendants - Kamarul Ariffin Hassan; M/s Kamarul Hakimi Ansor & Partners

[Appeal from High Court, Ipoh; Civil Suit No: 22-217-2000]

Reported by Suresh Nathan

JUDGMENT

Raus Sharif JCA:

[1] This appeal is directed against the decision of the High Court, Ipoh. The learned judge had held that there was an enforceable contract entered between the 1st defendant and the plaintiff. The contract was to sell and purchase a shop house held under document of title HS(D) DGS 1149, P.T. 4039, Mukim

Sitiawan, Perak ("shop house"). The appeal is by the 3rd, 4th and 5th defendants. They too had claimed that they had an enforceable contract with the 1st defendant over the same shop house.

[2] The facts relevant to this appeal are as follows.

[3] The 1st defendant, I.Z.A. Construction Co. Sdn. Bhd., is the beneficial owner of the shop house. The registered owner is the 2nd defendant, the Perbadanan Kemajuan Negeri Perak. The plaintiff wanted to purchase the shop house. On 13 July 1999, she paid to a firm of solicitors M/S Adham Badrul Co. ("AB solicitors") RM13,000, representing 10% of the purchase price, as deposit for the purchase of the shop house. AB solicitors were acting for the 1st defendant.

[4] On 24 August 1999 a draft sale and purchase agreement ("agreement") was prepared by the plaintiff's solicitors, M/S Mustafa, Ling & Co. The agreement was forwarded to AB solicitors. On 23 September 1999, AB solicitors replied that the sale price shall be RM180,000. They requested the plaintiff's solicitors to amend the agreement. The amendments as suggested by AB solicitors was done by the plaintiff's solicitors. On 14 October 1999, 3 copies of the agreement were forwarded to AB solicitors.

[5] On 21 October 1999, at about 15.14pm, the plaintiff's solicitors received from AB solicitors, a copy of a letter dated 20 October 1999, by fax informing that:

(a) the 1st defendant had obtained a consent letter from the 2nd defendant to transfer to the 1st defendant the shop house, and

(b) the 1st defendant would only sign the agreement provided that the plaintiff agreed to pay the 1st defendant RM18,000 being the deposit and RM500 to 2nd defendant being the service fees of the transfer.

[6] The plaintiff's solicitors responded immediately. On the same day, ie, 21 October 1999, they forwarded to AB solicitors a cheque for RM18,000 as deposit and another cheque for RM500 as service fees in favour of the 2nd defendant. However by a letter dated 22 October 1999, the plaintiff's solicitors was

informed by AB solicitors that they did not have any authority to accept the cheques. They also received on the same day a letter dated 20 October 1999, from AB solicitors stating that the 1st defendant had no longer any intention to proceed with the transaction.

[7] The plaintiff, unhappy with the action of the 1st defendant lodged a caveat on the title of the shop house. It was lodged on 20 October 1999.

[8] It is the plaintiff's case that she had an enforceable contract with the 1st defendant. Hence, in her statement of claim, she sought for the following reliefs:

(i) a declaration that a contract exist between herself and the 1st defendant over the shop house;

(ii) specific performance of the contract;

(iii) vacant possession of the shop house;

(iv) damages;

(v) a set off from the damages to be awarded against the balance payment of purchase price and other outgoings levied on the shop house; and

(vi) costs.

[9] The 1st defendant did not deny the negotiations between themselves and the plaintiff over the sale and purchase of the shop house. However in their defence, they contended that the offer to purchase was withdrawn on 20 October 1999 because the plaintiff had failed to pay the RM18,000 deposit. As a result they had entered into another sale and purchase agreement ("alternate agreement") with the 3rd, 4th and 5th defendants for the sale and purchase of the shop house.

[10] The alternate agreement was purportedly signed on 25 October 1999. The purchase price was RM190,000. The 10% deposit was paid on 22 October 1999. RM38,000 was paid subsequently. The balance was settled by way of a bank loan from Hong Leong Bank Berhad. But the transfer and the charge could not be registered due to the caveat entered by the plaintiff.

[11] The 3rd, 4th and 5th defendants' case is that they had an enforceable contract with the 1st defendant. Thus, in their counter-claim against the plaintiff and the 1st defendant, they demanded the removal of the caveat; the transfer of the shop house to them, and be compensated for the delay in completing the sale as the result of the caveat on the title of the shop house.

[12] During the trial before the High Court, it was agreed among all parties that the issue of liability should be determined firstly before the question of quantum is heard. With that understanding, the learned judge had after hearing evidence and submissions by all parties formulated two issues for his determination, namely:

(i) Was there an enforceable contract entered into between the 1st defendant and the plaintiff to sell and purchase the shop house under the circumstances.

(ii) If there is an existence of an enforceable contract what are the rights and interest of the 3rd, 4th and 5th defendants in the shop house.

1st Issue

[13] The learned judge answered the first issue in the positive, that is, that there was an enforceable contract entered into between the 1st defendant and the plaintiff. The learned judge held that the second offer to purchase the shop house commenced when the AB solicitors on 23 September 1999 wrote to the plaintiff's solicitors declaring the purchase price has had been varied to RM180,000. The offer was accepted by the plaintiff when the plaintiff's solicitors by a letter dated 21 October 1999, tendered the two cheques amounting to RM18,000 and RM500 respectively to the AB solicitors.

[14] Before us learned counsel for the 3rd, 4th and 5th defendants submitted that the learned judge had erred in facts in concluding that there was a concluded contract between the plaintiff and the 1st defendant. According to him, the said decision was against the weight of evidence adduced in court. To him, the offer to sell the shop house had been withdrawn when the deposit allegedly was not paid by the plaintiff.

[15] With utmost respect and having read and re-read the judgment under appeal, we do not detect any error on the findings of the learned judge. Clearly, the learned judge did consider all the evidence in its entirety but found the evidence of the 1st defendant to be lacking in credibility. This is what he said:

> Was this offer accepted? I find that it was. Not by the letter from the plaintiff's solicitors dated 14.10.1999 (page 9 of enclosure 16) but by the plaintiff's solicitor's subsequent letter dated 21.10.1999 (page 16 of enclosure 16) where the plaintiff's solicitors tendered the two cheques amounting to RM18,000.00 and RM500.00 respectively to AB solicitors.
>
> Though the 1st defendant insists that their solicitor did not receive this letter with the attached cheques until the 23.10.1999, which time AB solicitors had terminated the offer in their letter to the plaintiff's solicitor (page 14 of enclosure 16), I find this not probable.
>
> To begin with, this letter purporting to terminate the offer for sale by AB solicitors is dated 20.10.1999. But, as insisted by the DW 2 (the solicitor in AB solicitors in charge of this transaction) this date is incorrectly inserted. It should be 22.10.1999. If it is dated the 22nd then it may have clashed with the receipt of the plaintiff's letter of acceptance. However this is challenged by the 1st defendant who maintains that its solicitors never received this letter of acceptance on the 22nd, but on the 23rd. But this claim is tainted with inaccuracy. If AB solicitors only received the plaintiff's solicitor's letter of offer on the 23rd AB solicitors would have dated their letter returning the cheques subsequent to the 23rd. Instead their letter bears 22.10.1999. This obviously implies that AB solicitors must have first received the plaintiff's solicitor's letter of offer with the cheques before returning them by letter of the even date; and not on the 23rd as claimed.
>
> When this discrepancy was raised, DW2, attempted once again, to explain that the said letter was incorrectly dated. But mistake, as an excuse seems to be too rampant and flippant in this case to be convincing. I am of the view that documentary evidence bears greater truth than the oral testimonies of the 1st defendant's witnesses. This letter of the AB solicitors dated the 22nd specifically referred to the plaintiff's solicitor's letter of offer of the 22nd. It must have been written immediately upon receipt. There was urgency at the material time. The 3rd to 5th defendants had paid the 10% deposit for the fresh sale on the same day. These circumstances warranted an immediate reply, and I believed that they did on the 22nd itself rather than the 23rd.

[16] It is our judgment that the above findings of the learned judge were findings of facts. There is no dearth of authority dealing with the approach that the appellate court should take when reviewing the findings of facts by the trial court. The settled principle of law is that, it is undesirable that the factual findings of the trial court be disturbed by the appellate court unless it appears that those findings are clearly wrong. And it is even more undesirable to do so where the conclusion reached, to a large extent, depended on the credibility of the witnesses and the impression formed by the trial judge which has seen them and judged their honesty and accuracy. (See Federal Court case of *China Airlines Ltd v. Maltran Air Corporation Sdn. Bhd. & Another Appeal* [1996] 3 CLJ 163).

[17] In the present case, the conclusion reached by the learned judge was based on the credibility of the witnesses and the impression that he formed. He found it as a fact that the plaintiff's acceptance of the offer was received by AB solicitors on 22 and not on 23 as claimed by the 1st defendant. The learned judge disbelieved the 1st defendant's story as he found the evidence of the 1st defendant to be lacking in credibility. He gave his reasons for holding as such. Looking at his reasons, we do not see it in any way tainted with lack of judicial appreciation of the evidence placed before him. Nor did he commit any fundamental misdirection or was plainly wrong in his conclusion or inference to justify this court's intervention. Thus, we are unable to accept the invitation of the learned counsel for the 3rd, 4th and 5th defendants to reverse the findings of fact of the learned judge. We agree with the learned judge that there was an enforceable contract between the plaintiff and the 1st defendant over the shop house.

2nd Issue

[18] The learned judge found that since the plaintiff had a prior right to the said shop house, the 3rd, 4th and 5th defendants' claim that they had an enforceable contract with the 1st defendant cannot succeed. He also made a finding that the equitable principle of a *bona fide* purchaser for value, as claimed by the 3rd, 4th and 5th defendants, has no application in this case. Firstly, it was not pleaded. Secondly, the facts does not support such claim. The learned judge's reasons are as follows:

A 1. The speed of this sale between the 1st defendant and the 3rd to 5th defendants creates suspicion that these subsequent purchasers are not without knowledge of a prior buyer for the said property. They came to know of the property was for sale on the 21.10.1999 and by the afternoon on the next day, 10% deposit was paid, without even making a search with the Land Office to ascertain whether the said property was encumbered. If they had done so, even after the 22.10.1999 but before the entering into the sale and purchase agreement with the 1st defendant, they may find the plaintiff's caveat being lodged against the said property.

C 2. Further, AB solicitors were their solicitors. These solicitors have knowledge of the existence of an existing sale of the said property by the 1st defendant to the plaintiff. When their lawyers are possessed of this knowledge it is not open to the 3rd to 5th defendants to claim that such matter was not disclosed to them – see the case of *Dorshi v. Yeoh Tiong Lay* [1995] 1 MJ 85.

[19] We have no reasons to differ from the learned judge. It is our judgment that the 3rd, 4th and 5th defendants were not innocent *bona fide* purchasers as they claimed. The facts as found E by the judge clearly demonstrate that they knew about the transaction between the plaintiff and the 1st defendant. Even in law, they cannot claim that they have no knowledge of the said transaction. This is because AB were their solicitors. Their solicitors knew of the existence of the transaction between the F plaintiff and the 1st defendant. It is an established principle that the knowledge of a solicitor is the knowledge of the client. (See Federal Court case of *Doshi v. Yeoh Tiong Lay* [1975] 1 MLJ 85). Thus, the 3rd, 4th and 5th defendants being aware of the existence of an existing transaction between the plaintiff and the G 1st defendant cannot, as they did, claimed that they were the innocent *bona fide* purchaser of the shop house.

[20] For the above reasons, we unanimously would dismiss the 3rd, 4th and 5th defendants' appeal with costs. All the orders of the learned judge are hereby affirmed. We would also order that H the deposit is to be paid to the plaintiff to account of taxed costs.

I